...REME COURT, U. S.
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MICHAEL ROBAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-818

EDWARD R. BIGGER, WALTER BLACKMON, KENNETH DOOLEY, LUCILLE NORD, SHIRLEY GOFF, PAUL BROCK, JOSHUA HEBINGTON, ORVILLE THOMPSON, WILLIAM TEAGUE, MARGARET OSBORNE, CAROL L. CARRIE, and others too numerous to bring before the Court,
Petitioners,

v.

CITY OF PONTIAC and CITY OF PONTIAC STADIUM BUILDING AUTHORITY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

Milton M. Thompson
Dickinson, Wright, McKean & Cudlip
800 First National Building
Detroit, Michigan 48226
Telephone: 313-962-5860

Sherwin M. Birnkrant
Director, Department of Law
City of Pontiac, Michigan
450 Wide Track Drive, East
Pontiac, Michigan 48058
Telephone: 313-333-7131

Alger H. Strom
Deputy City Attorney
City of Pontiac, Michigan
450 Wide Track Drive, East
Pontiac, Michigan 48058
Telephone: 313-333-7131

Counsel for Respondents

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CITATIONS TO OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported in 390 Mich. 1, 210 N. W. (2d) 1 and is set forth at page 16 of Petitioners' appendix. The opinion of the Oakland County Circuit Court is printed in part in Petitioners' appendix at page 21. The judgment entered by the Oakland County Circuit Court appears in full in Respondents' appendix at page 1b.

JURISDICTION

The order of the Michigan Supreme Court affirming the Circuit Court judgment was entered on August 24, 1973. The opinion of the Supreme Court incorporating said order was issued on August 27, 1973, and was entered on September 4, 1973. The Petition for Certiorari was filed on November 23, 1973. The jurisdiction of the United States Supreme Court is invoked by Petitioners under Title 28, Section 1257(3), of the United States Code.

QUESTIONS PRESENTED

The three Questions Presented, as set forth in the Petition, are incomplete and include erroneous and misleading statements not in accord with the record. Respondents therefore submit the following counter-statement of the Questions Presented:

1. Have Petitioners complied with Supreme Court Rule 23 requiring that the Petition specify what, where and how alleged federal questions were raised and decided in the proceedings of the state courts?

2. Was any federal question presented or were Petitioners deprived by due process of law under the United States constitution by the state Supreme Court's refusal, solely on the ground of laches on the part of Petitioners, to review the trial court's decision on the merits?

3. Was any federal question presented or were Petitioners deprived of due process of law under the United States constitution by the decision of the state trial court, not considered or decided by the state Supreme Court, that public statements made by Respondents prior to the bond election to the effect that a covered stadium was con-

templated did not preclude initial construction of the stadium without a roof?

4. Was any federal question presented or were Petitioners denied any federal right by failure of the state Supreme Court to rule on the alleged intention of Respondents to make future misuse of federal revenue-sharing funds where the question was not pleaded or decided in either the trial court or the Supreme Court?

STATEMENT OF FACTS

The City of Pontiac and the City of Pontiac Stadium Building Authority (a public corporation organized by the City) determined early in the year 1970 to undertake the construction of a new stadium with the Detroit Lions professional football club as its principal tenant.

Initial financing plans were thwarted by the decision of the Michigan Supreme Court in *Alan* v *County of Wayne,* 388 Mich. 210, 200 N. W. (2d) 628 (1972). Thereafter, in the fall of 1972, it was concluded that the project could best be financed, consistently with that decision, by the sale of two issues of bonds: (1) general obligation bonds in the amount of $15,950,000 to be issued by the City and (2) revenue bonds in the amount of $25,000,000 to be issued by the Authority. Under applicable Michigan law, issuance of the general obligation bonds by the City required voted approval of a majority of the electors voting thereon (Mich. Comp. L. 1948, §117.5(e), as amended; M. S. A. §5.2084(e)), whereas issuance of the revenue bonds by the Authority did not require such voted approval unless, within 30 days after publication of a notice of intention to issue the bonds, a petition requesting a referendum thereon signed by at least 10% of the registered electors, was filed with

the Authority (Mich. Comp. L. 1948, §141.133, as amended; M. S. A. §5.2763).

The City, on October 10, 1972, enacted Ordinance No. 1649, providing for issuance of the general obligation bonds, setting forth the form of the ballot proposition, and calling a special City election thereon for December 11, 1972. The ordinance as well as notices of the election were duly published, the election was duly held, and the issuance of the bonds was approved by majority vote of the electors.

The Authority, on January 10, 1973, published its notice of intention to issue the revenue bonds, specifying that a petition for a referendum on issuance of the bonds might be filed within 45 days thereafter (not merely the 30 days provided by statute). No such petition was filed at any time.

On or about February 22, 1973, substantially the same persons who are the present Petitioners (represented by their present attorney) filed a suit against the City and the Authority in the Circuit Court for Oakland County, seeking preliminary and permanent injunctions against issuance of the bonds on the ground that the general obligation bond proposition, not having been approved by a two-thirds majority of the electors voting thereon, was not legally adopted. The Circuit Court, after hearing, dismissed the complaint, holding that a simple majority vote was sufficient. However, at the time of the hearing, plaintiffs therein amended their complaint, charging that the election was invalid because of alleged misrepresentations as to the number of new jobs which would result from construction of the stadium and alleged irregularities in the counting and recounting of the votes at the election. The validity of the election was upheld by the Circuit Court

and the amended complaint was dismissed, after hearing, on March 12, 1973. No appeal was taken from the Summary Judgment entered by the Circuit Court.

The City and the Authority thereafter proceeded with adoption and execution of the definitive documents essential to issuance of the bonds. They executed a Lease-Agreement on March 20, 1973, providing for construction of the stadium by the Authority, the lease thereof to the City, and the issuance of the bonds. On the same day the City adopted the necessary resolution providing for issuance of the $15,950,000 general obligation bonds and the Authority adopted the necessary ordinance providing for issuance of the $25,000,000 revenue bonds. On April 23, 1973, the City and The Detroit Lions, Inc. entered into a Sublease and License providing for use of the stadium by the Lions. Construction bids were taken on or about June 12, 1973, with an expiration date of August 11, 1973, which on or about the latter date was extended to September 7, 1973. The issuance of both issues of bonds was approved by orders issued by the Municipal Finance Commission of the State of Michigan on June 19, 1973 (no other approval by any state officials being required).

The sale of both issues was advertised on July 3, 1973 and the bonds were sold on July 17, 1973. It was stipulated in the official notice of sale that a certificate that no litigation was pending affecting the bonds would be furnished at the time of delivery and that, if the bonds were not delivered within 45 days after the sale, the purchasers might withdraw their bids. Litigation held up delivery until September 6, 1973, when the purchasers finally accepted delivery and made payment, they having agreed to accept a

qualified no-litigation certificate. The proceeds have been disbursed in substantial amounts and construction of the stadium is well under way.

All of the above-mentioned documents and events received wide and detailed current publicity in the local press.

On July 18, 1973, one day after the bonds were sold, the present Petitioners (represented by their present attorney) filed a so-called Complaint as an original proceeding in the Michigan Supreme Court. The document so filed was substantially the same in content as the Complaint later filed in Circuit Court by which the present action was commenced. There being no basis for such an original proceeding, the Michigan Supreme Court, on July 31, 1973, dismissed the proceeding.

The next day, on August 1, 1973, Petitioners filed in the Circuit Court for Oakland County the Complaint in the present action, and on August 7, 1973, they filed an amendment adding a new paragraph 7a to the Complaint. The Complaint, as so amended, is set forth at page 7b of the Appendix.

As will be seen, the prayers of the Complaint were for temporary and permanent injunctions against the issuance of the bonds. Various allegations were contained in the Complaint but the only ones having any apparent relevance to the Petition for Writ of Certiorari were those which (while far from explicit) were treated by the parties and by the Circuit Court as alleging in effect that, whereas prior to the December 11 election and up to approximately March 13, 1973, Respondents had stated publicly and in

the press that the stadium would include a roof or dome, on or about the latter date it was made publicly known that the contracts with the Detroit Lions and for construction of the stadium would not specify a covered stadium but would require only that an open stadium be constructed. This change in plans was alleged to constitute a fraud on the electors and taxpayers which, if the bonds were to be issued, would "cause an unconstitutional and unlawful diversion of moneys raised by taxation." (Complaint, par. 13).

There was and is no issue as to any material fact pertaining to construction of the roof. Respondents acknowledged at the hearing in Circuit Court and they acknowledge now that initial plans called for such construction; that they made statements publicly and in the press, prior to the election and thereafter, to the effect that construction of a roof was contemplated; that, early in March, 1973, they reached the conclusion that a potential shortage of funds precluded them from contracting initially for such construction; that this conclusion was thereupon publicly announced and reported in the press; and that the construction contract and the contract with the Detroit Lions as executed accordingly required construction only of an open or uncovered stadium.

Respondents satisfied the Circuit Court, however, that they had not abandoned but only deferred construction of the roof as evidenced by the inclusion thereof in required architects' plans and the inclusion of a $2,000,000 concrete compression ring around the top of the stadium to support the roof when later constructed. See paragraph 2(a) of the judgment rendered by the Circuit Court (App. 2b).

Respondents having filed motions for accelerated and summary judgments, the Circuit Court held hearings thereon, and on August 8, 1973, rendered its opinion and entered its judgment granting the motions and dismissing the Complaint with prejudice. Petitioners have seen fit to include a portion of the opinion in their Appendix (Pet. App. 19-32) but not the judgment. It is a most informative document and is set forth in the Appendix hereto (App. 1b). The Complaint was dismissed, it will be noted, not only on the merits but also because of laches on the part of Petitioners in bringing the suit. The findings, conclusions and reasoning of the court are discussed in the following section of this brief which is headed "Argument."

Although Respondents were the prevailing parties on the basic issues, the Michigan Supreme Court, on August 15, 1973, issued an order granting emergency review at the instance of Respondents, by-passing the state Court of Appeals, in order to secure final adjudication within the period available for delivery of the bonds and acceptance of construction bids. Respondents were technically designated as appellants (a status to which they were entitled since, in addition to asking for a full review of the Circuit Court judgment, they were appealing from Circuit Court denial of their prayer for an injunction against institution of further litigation by Petitioners) but the Michigan Supreme Court, not limiting itself to the narrow issue of such an injunction, exercised its powers of general superintending control to review the Circuit Court judgment and finally dispose of the case. The Supreme Court ordered the parties to submit pleadings and briefs by August 21 and

gave notice that it would decide the case on the basis of pleadings filed by that date.

The Michigan Supreme Court, on August 24, 1973, entered its order affirming the judgment of the Circuit Court. Its opinion followed on August 27, 1973, holding in effect that Petitioners were barred by their delay and laches from maintaining the suit, but not ruling on the merits (Pet. App. 15).

This story would not be complete without noting that, on or about August 30, 1973, in a final desperate effort to prevent delivery of the bonds, the attorney for Petitioners filed a suit in the U. S. District Court for the Eastern District of Michigan, Southern Division, against Respondents and George P. Shultz, Secretary of Treasury, seeking to enjoin alleged misuse of federal revenue-sharing funds and alleged violation of the National Environmental Policy Act of 1969 (Public Law 91-190, 42 U. S. C. 4321). The named plaintiffs, Sierra Club and Pontiac Environmental Defense Fund, were in effect found by the court to be non-existent. Their alleged attorney denied that the persons actually responsible for bringing the suit were the same as Petitioners but he refused to name such persons. The court (App. 13b) stated in its opinion that, if they were not the same persons as Petitioners, "it is only because there are no parties plaintiff at all in this action." The U. S. District Judge, Honorable Lawrence Gubow, held that plaintiffs therein had no standing to sue, that no federal question was involved, and that in any event, the action was barred by laches. Defendants' motion to dismiss was granted with prejudice. The order and an excerpt from the opinion are set forth at pages 12b and 13b, re-

spectively, of the Appendix. The time for taking an appeal has expired and no appeal has been filed.

Respondents, never having abandoned but only deferred construction of the stadium roof, now find that, with a decided improvement in the financial situation of the project, they are after all in a position to include the roof as a part of the initial construction project. On November 7, 1973, two weeks before the Petition for Writ of Certiorari was filed, the Authority adopted a resolution so declaring and directing that the construction contract be amended to require construction of the roof. The construction contract has accordingly been so amended and a copy of the amendment (reciting the resolution) is set forth at page 16b of the Appendix. Since this presumably meets Petitioners' objections there would seem to be no further point to their Petition.

ARGUMENT

THIS CASE IS NOT OF SUCH A CHARACTER AS TO WARRANT ISSUANCE OF THE WRIT OF CERTIORARI.

This litigation, including the Petition for Writ of Certiorari, is a part of a series of frivolous and vexatious suits brought by a small group of disgruntled Pontiac residents, represented each time by the same attorney, for the sole purpose of blocking the issuance of bonds approved by the voters to finance a new stadium in the City. In bringing these nuisance suits, all of which have been dismissed below, Petitioners have relied for their success not upon the merits of their case but rather upon the

recognized fact that mere pendency of such litigation, no matter how lacking in merit, ordinarily prevents purchasers of bonds from taking delivery and making payment. See the penultimate paragraph of the state Supreme Court opinion (Pet. App. 18) and the excerpt from the opinion rendered by U. S. District Judge Lawrence Gubow in the related case, *Sierra Club, et al* v *Shultz, et al* (App. 13b).

The issues raised have been fairly and correctly decided in the state courts and there are no special or important reasons for Supreme Court review. The controversy is local in scope and essentially political in nature. No federal-state or inter-state relations are involved nor does the case have any national significance or involve any important question of federal law or any question requiring decision for future guidance of state or federal courts.

There are two very significant aspects of the case which indicate that, for all practical purposes, the questions involved must be considered as moot:

1. The bonds have been sold and delivered, payment therefor has been received, and the stadium is under construction. The prayers of the Complaint, seeking an injunction against issuance of the bonds, therefore could not be granted. Respondents, it will be noted, were never prevented from issuing the bonds by any restraining order or injunction.

2. It was found by the trial court decision, left standing by the state Supreme Court, that construction of the stadium roof had not been abandoned but only deferred (App. 2b). As set forth in the Statement of Facts, *supra*, the construction contract has been amended (App. 16b) to

require inclusion of the roof in initial construction. Petitioners therefore would seem to be getting precisely what they seek and so may wish to withdraw their Petition.

Respondents nevertheless now turn to a consideration of the Questions Presented as above restated.

I

PETITIONERS HAVE NOT COMPILED WITH SUPREME COURT RULE 23 REQUIRING THAT THE PETITION SPECIFY WHAT, WHERE AND HOW ALLEGED FEDERAL QUESTIONS WERE RAISED AND DECIDED IN THE PROCEEDINGS OF THE STATE COURTS.

This proposition applies to all of the Questions Presented as set forth in the Petition and is urged with respect to each of them.

Not one of the three Questions Presented in the Petition sets up any federal question which was raised or decided in the state courts. A review of the state court pleadings and decisions will disclose no instance where any denial of rights under the United States constitution or any specific provision thereof was asserted or considered. The Petition makes no reference to any such instance but attempts to raise the issues for the first time in the Supreme Court.

Supreme Court Rule 23 specifically requires in Paragraph 1 (d) that the constitutional and other federal law provisions which the case involves be set out verbatim in the Petition (or, if lengthy, in an appendix) with citations of the volume and page where they may be found in the official edition.

Rule 23 further requires in Paragraph 1 (f) that the statement of the case shall specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised, the method of raising them, the way in which they were passed upon by the court, and such pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears, "as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

The Petition makes no pretense of complying with these requirements of the rules, and for the simple reason that Petitioners could not comply, no federal question having in fact been raised or decided in the state courts. But it is established law that jurisdiction of the Supreme Court to review state court decisions under 28 U. S. C. §1257 is limited not only to federal questions but to federal questions properly raised in the state court proceedings. As was said by the Supreme Court in *Oxley Stave Co.* v *Butler County,* 166 U. S. 648 (1897) at 655: "* * * the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

The Supreme Court further stated in *New York Central Railroad Co.* v *New York,* 186 U. S. 269 (1902) at 273: "* * * it is well settled in this court that it must be made

to appear that some provision of the Federal, as distinguished from the state, Constitution was relied upon, and that such provision must be set forth." It is accordingly held that an allegation in the state courts that "constitutional rights" or "due process of law" were denied is not sufficient to raise a federal question inasmuch as the presumption is that the references are to state constitution provisions. *New York ex rel. Bryant* v *Zimmerman,* 278 U. S. 63 (1928), 67-68; *Bowe* v *Scott,* 233 U. S. 658 (1914), 664-665. It will be noted that the Michigan constitution of 1963 contains both equal protection and due process clauses (Art. I, Secs. 2 and 17).

Not only must the federal question be raised in the state courts, it must be raised in the trial court, at least in those jurisdictions where, as in Michigan (*Portell* v *Feldman,* 354 Mich. 611, 93 N. W. (2d) 305 (1958); *Arrett* v *Janks,* 365 Mich. 293, 112 N. W. (2d) 485 (1961), appellate courts are under no obligation to hear or decide issues not raised in the trial court. *Edelman* v *California,* 344 U. S. 357 (1953); *Pennsylvania R. R. Co* v *Illinois Brick Co.,* 297 U. S. 447 (1936). The question must be raised by pleadings and cannot be raised by briefs. *Live Oak Ass'n* v *Railroad Commission,* 269 U. S. 354 (1926); *Lynch* v *New York ex rel. Pierson,* 293 U. S. 52 (1934). Furthermore, the federal question, even where properly raised in the trial court, must be pursued in the state appellate court. *Herndon* v *Georgia,* 295 U. S. 441 (1935).

II

NO FEDERAL QUESTION WAS PRESENTED NOR WERE PETITIONERS DEPRIVED OF DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION BY THE STATE SUPREME COURT'S REFUSAL, SOLELY ON THE GROUND OF LACHES ON THE PART OF PETITIONERS, TO REVIEW THE TRIAL COURT'S DECISION ON THE MERITS.

Question 2, herein discussed, is a restatement of Petitioners' Question 1. As stated above, this question is not properly before the Supreme Court, it is not having been raised or decided in the state courts. At no point in the state proceedings was it ever contended that failure of the Supreme Court to decide the case on the merits would raise a federal question of denial of due process of law under the United States constitution.

REASONS FOR RESTATEMENT OF QUESTION

Respondents have found it necessary to recast the question because, as presented by Petitioners, it included several erroneous and misleading statements which are discussed below:

(1) Petitioners' statement of the question referred to "the trial court's refusal to hear the merits." The fact is, of course, that the trial court not only heard the merits but dismissed the Complaint on the merits as well as on the ground of laches. See the Circuit Court judgment (App. 1b) and particularly paragraphs 1, 2, 7 and 8 thereof.

(2) Petitioners attempted to escape responsibility for their own delay and laches by including the statement that the Michigan Supreme Court refused to hear the case on the merits "on the grounds of insufficient time based upon Respondents' self-imposed timetable." Let us not lose sight of the fact that the court held it had insufficient time because

Petitioners "allowed the balance of the month of April, all of the months of May and June and half of the month of July to pass without commencing any legal proceedings." The court stated that "had the plaintiffs in April, rather than inexplicably waiting until August, instituted this action, there would have been adequate time for preparation, presentation and reflection." See Opinion, Pet. App. 17-18. It is further to be noted that prior to the filing of suit by Petitioners, Respondents had taken construction bids with an August 11 expiration date and had sold and contracted to deliver the bonds by August 31, 1973, with the result that the timetable was fixed and out of Respondents' control before they had any notice of the suit.

(3) Petitioners also attempted to escape responsibility for their own delay and laches by including the statement that "Respondents had invited Petitioners to delay until the very date of institution of suit." Petitioners (Pet. 3-4) purport to find the so-called "invitation to delay" in a document filed by Respondents with the Oakland County Circuit Court on February 26, 1973, in the earlier case which Petitioners brought and lost and from which they took no appeal. That document was headed "Objections to Entry of Preliminary Injunction" and in it the argument was made that, since it would be some months before bonds could be sold, there was no threat of imminent action by Petitioners as would warrant the issuance of a preliminary injunction to bring all bond proceedings to a halt pending final decision on the merits. Petitioners have conveniently omitted the word "Preliminary" from the heading and have included only a part of one paragraph of this document in their appendix (Pet. App. 14). The full paragraph is hereinafter reproduced (App. 10b). The term "preliminary"

is used three times in that brief paragraph. It is so apparent that the statement related only to the grounds for a preliminary injunction that its use by Petitioners as evidence of an "invitation to delay" any later attack upon issuance of the bonds must raise questions as to good faith and motive. It is utterly absurd to suggest that Respondents, faced with collapse of the project if the bonds could not be delivered and construction bids accepted within a fixed time after the bond sale, would invite delay in filing suit until after the sale.

Respondents take no issue with Petitioners as to the cases cited on page 4 of the Petition but they have no application to this case. The timing of the suit was not induced by Respondents but solely by Petitioners' determination to delay filing until it would do the most damage.

DISMISSAL OF THE COMPLAINT ON GROUND OF LACHES PRESENTS NO FEDERAL QUESTION.

The record in this case establishes that Petitioners, knowing full well that the bonds could not be delivered with litigation actively pending and that stadium construction bids were about to expire, and wishing to delay the filing of suit long enough to preclude final adjudication within the time available to Respondents for making delivery and accepting the bids, sat idly by for some three or four months with full knowledge of the facts before starting suit. The record further establishes that during that time Respondents took various well-publicized actions in the process of issuing the bonds and contracting for construction and incurred large expenditures of money and effort to their material detriment. See paragraph 9 of the Circuit Court judgment (App. 5b). See also, for corroboration,

the above-mentioned excerpt from the opinion of U. S. District Judge Lawrence Gubow in *Sierra Club, et al* v. *Shultz, et al* (App. 13b) and the judgment entered therein (App. 11b).

The Oakland County Circuit Court (App. 6b), on the basis of these facts, found that Petitioners were barred by laches from maintaining the suit and dismissed the Complaint upon this ground as well as upon the merits. The Michigan Supreme Court (Pet. App. 15-18) affirmed on the sole ground of laches but did not rule on the merits.

Such ultimate disposition of the case solely on the ground of laches does not present any federal question. It has been long settled in the Supreme Court that, where the state courts hold that an action is barred by laches, statutes of limitations or estoppel, such ground constitutes an adequate non-federal ground and does not present a federal question giving the Supreme Court jurisdiction.

In *Wood* v *Chesborough,* 228 U. S. 672 (1913), jurisdiction was refused where the state court had held that the action was barred by laches, the Supreme Court saying (at 677): "* * * it is well established that if there be Federal and non-Federal grounds, and the latter be sufficient to support the judgment of the State court, there can be no review by this court. And certainly the application of laches and the statute of limitations does not present a Federal question."

In *Preston* v *Chicago,* 226 U. S. 447 (1913), the ruling was the same, and the Supreme Court said (at 450): "* * * as in addition the court below held that the right to the relief prayed was in any event barred by long delay and

laches, this would be sufficient to prevent us from reviewing the alleged Federal question."

To similar effect see *Utley* v *St. Petersburg,* 292 U. S. 106 (1934); *Michigan* v *Flint and Pere Marquette Railroad Co.,* 152 U. S. 363 (1984); and *Beals* v *Cone,* 188 U. S. 184 (1903).

The argument made by Petitioners that the refusal of the Michigan Supreme Court to hear this case on the merits constituted a denial of their rights under the due process clause of the Fourteenth Amendment is in effect an argument that the due process clause precludes application of the doctrine of laches so as to bar an action based upon a constitutional right. The cases cited above show that such is not the law. A party who sleeps on his rights, be they constitutional or otherwise, runs the risk of losing them. And when a state court, applying state law, decides that he has lost them, the United States Supreme Court will not intervene (see cases above cited).

III

NO FEDERAL QUESTION WAS PRESENTED NOR WERE PETITIONERS DEPRIVED OF DUE PROCESS OF LAW UNDER THE UNITED STATES CONSTITUTION BY THE DECISION OF THE STATE TRIAL COURT, NOT CONSIDERED OR DECIDED BY THE STATE SUPREME COURT, THAT PUBLIC STATEMENTS MADE BY RESPONDENTS PRIOR TO THE BOND ELECTION TO THE EFECT THAT A COVERED STADIUM WAS CONTEMPLATED DID NOT PRECLUDE INITIAL CONSTRUCTION OF THE STADIUM WITHOUT A ROOF.

This proposition answers Question 3 which is a restatement of Petitioners' Question 2.

If either of the arguments advanced above under head-

ings I and II be accepted, viz., (1) that the question as to whether deferment of construction of the roof presented a federal due process issue was never raised or decided in the state courts, or (2) that the refusal of the state Supreme Court to review that question because of laches on the part of Petitioners amounted to a disposition of the case on an adequate and independent non-federal ground, then there is actually no reason even to reach restated Question 3. The state Supreme Court did not consider or decide the question as to deferral of construction of the roof but placed its decision solely on the non-federal ground of laches and so there is in fact no federal question for the United States Supreme Court to review.

REASONS FOR RESTATEMENT OF QUESTION

The question as stated by Petitioners has been restated for the following purposes:

(1) To make clear that it is the decision of the trial court to which Petitioners take exception—a decision which was not considered or passed upon by the state Supreme Court.

(2) To indicate that the issue presented is not whether the stadium proposed to be constructed is different from the stadium specified on the ballot (which referred only to a "stadium" without specification of either a covered or a non-covered stadium) but rather whether deferment of construction of a roof is precluded by public statements made by Respondents prior to the election to the effect that a covered stadium was contemplated. The reference to a popular vote on a "super-stadium project" is deleted because the vote was merely on issuance of bonds to finance a "stadium".

(3) To take out the argumentative statement that "local law required a full disclosure of the purpose and scope on election ballots." The record discloses no local law requirement except that the ballot state the purpose of the bond issue. The purpose, viz.. construction of a "stadium", was stated in general terms just as are bond propositions for other projects, e.g., for construction of a courthouse, a high school, or a water or sewerage system, without going into details as to size, design, etc.

THE DECISION OF THE TRIAL COURT WAS CORRECT AND INVOLVED NO DENIAL OF DUE PROCESS.

There was no evidentiary hearing in the trial court and there was no occasion for such a hearing inasmuch as, on a motion for summary judgment (formerly, in Michigan, a motion to dismiss), all well-pleaded facts are treated as true—i.e., as if they had been established by evidence. *Whittenberg* v *Carnegie,* 328 Mich. 125, 42 N. W. 2(d) 900 (1950); *Kinsey* v *Lake Odessa Machinery Products,* 368 Mich. 666, 118 N. W. 2(d) 950 (1962). The trial court (Pet. App. 21) stated that "I do not find any dispute or issue of fact left for trial."

It was the contention of Petitioners that, as a result of the statements admittedly made by Respondents prior to the election to the effect that a roof was contemplated, Respondents became obligated to construct the roof, and their later decision to defer construction and not to include the roof in the initial construction contract was a sufficient basis for enjoining issuance of the bonds. It is alleged in the Petitioners' Statement of Facts (Pet. 5) that Respondents knew and advised the owner of the Detroit Lions before the election of the "anticipated alteration" of the stadium but

there is nothing in the record to support this allegation. The alleged date of change of plans by Petitioners' own allegation was subsequent to the election and was given at an earlier point in the Statement of Facts (Pet. 4) as March 19, 1973, and in the Complaint (App. 8b) as March 13, 1973.

The contention of Petitioners was categorically rejected by the trial court which, in paragraph 2(b) of the Summary Judgment (App. 3b), held as a matter of state law as follows:

> "In view of the fact that Ordinance No. 1649, the published ordinance and notices of election, and the ballot proposition all referred only to the construction of a 'stadium,' i. e., that it was a 'stadium' and not a 'covered stadium' that the people authorized, the representations made prior to the election cannot properly be construed as imposing a binding obligation requiring the municipality to construct a covered stadium or, in any event, precluding it from, in its discretion, deferring the construction of the dome or roof until some future date."

In so determining the applicable Michigan law the trial court followed established law in other jurisdictions. Many of the cases are cited in the opinion (Pet. App. 29-31). They generally stress the importance of the official proceedings and ballot, as distinguished from extrinsic statements made prior to the election, and afford a wide discretion to public officials in construction of the project so long as it conforms to the voted purpose as specified on the ballot.

The Supreme Court, in *Detroit United Railway* v *City of Detroit*, 255 U.S. 171 (1921), agreed with the above principles in the following terms (p. 178):

> "The bill abounds in allegations that voters were misled by the fraudulent conduct of the officials of the city in their efforts to procure the property of the complainant at less than its value by misrepresenting in a circular, and otherwise, the purpose and effect of the vote to be taken upon the question of acquiring a municipal system of transportation. We think that the court below correctly held that the motives of the officials, and of the electors acting upon the proposal, are not proper subjects of judicial inquiry in an action like this so long as the means adopted for submission of the question to the people conformed to the requirements of the law."

A leading case (cited in the opinion, Pet. App. 29) is *Sykes* v *Balk,* 278 N. C. 106, 179 S. E. (2d) 439 (1971), wherein numerous other cases are analyzed, largely to the same effect as above. The *Sykes* case deserves extensive quotation but space forbids.

The trial court decision, being on a question of local law, involved no federal question, and, in any event, being sound and correct, involved no denial of due process or other legal rights.

It is to be noted that even if the trial court's decision were construed as an erroneous decision of a federal question, there would still be no ground for Supreme Court review, inasmuch as the state Supreme Court did not consider or decide such question but disposed of the case on the adequate and independent non-federal ground of laches. "The Supreme Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent nonfederal ground, even though a federal question be involved and perhaps wrongly decided. *Murdock* v *Memphis,* 20 Wall.

590, 636; *Berea College* v *Kentucky*, 211 U. S. 45, 53; *Fox Film Corporation* v *Muller*, 296 U. S. 207." Stern and Gressman, *Supreme Court Practice* (4th ed.), 131-132.

Now that it has been determined that funds are available to construct the roof and that it is in fact to be constructed, Petitioners' arguments have in any view become academic, and the Petition may properly be denied on the ground of mootness.

IV

NO FEDERAL QUESTION WAS PRESENTED NOR WERE PETITIONERS DENIED ANY FEDERAL RIGHT BY FAILURE OF THE STATE SUPREME COURT TO RULE ON THE ALLEGED INTENTION OF RESPONDENTS TO MAKE FUTURE MISUSE OF FEDERAL REVENUE-SHARING FUNDS WHERE THE QUESTION WAS NOT PLEADED OR DECIDED IN EITHER THE TRIAL COURT OR THE STATE SUPREME COURT.

Question 4, to which this proposition is in reply, is a restatement of Petitioners' Question 3.

REASONS FOR RESTATEMENT OF QUESTION

The question presented by Petitioners has been restated for the following reasons:

(1) The state Supreme Court, while refusing to rule on the merits at all, may not properly be said to have "refused to rule" on this particular question since it was not raised or decided in the trial court and was not before the state Supreme Court.

(2) The self-serving conclusion that "the funds were being applied to interest on the bonds issued for capital improvements contrary to Public Law 92.512" is contrary to fact and without any support in the record.

THERE IS NO ISSUE IN THIS CASE AS TO THE USE OF FEDERAL REVENUE-SHARING FUNDS.

The Petition (p. 5) states that Petitioners "included the issue" but this is a purely gratuitous statement not indicating where or when and not supported by the record. The same may be said of the casual comment (p. 6) that the issue was "mentioned on the record."

Respondents do not need to be told by Petitioners that use of federal revenue-sharing funds to pay interest on bonds is unlawful. They have no intention of violating the law. Public Law 92.512 (31 U. S. C. § 1221, 1222), adopted October 20, 1972, permits use of such funds for "ordinary and necessary capital expenditures." It was not until Administrative Ruling 73-1 was published by the Treasury Department (Office of Revenue Sharing) on February 13, 1973 (Fed. Reg. Vol. 38, No. 29) that it became clear that such funds could be used to pay principal but not interest. Respondents have not "admitted in print" as recently as December 12, 1973 (1972!) (Pet. 10) or at any other time that they did not intend to follow this ruling.

If it should appear at some future date that revenue-sharing funds are about to be used for an improper purpose (the first bond interest is not due until March 1, 1974), a suit might be brought to restrain such use, but even if such use were deemed to be threatened, this would have nothing to do with issuance of the bonds or their validity.

The point to be stressed, however, is that this issue is wholly foreign to the present case, it never having been raised or decided in the state courts, as is evident from the record.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Milton M. Thompson
Dickinson, Wright, McKean
& Cudlip
800 First National Building
Detroit, Michigan 48226
Telephone: 313-962-5860

Sherwin M. Birnkrant
Director, Department of Law
City of Pontiac, Michigan
450 Wide Track Drive, East
Pontiac, Michigan 48058
Telephone: 313-333-7131

Alger H. Strom
Deputy City Attorney
City of Pontiac, Michigan
450 Wide Track Drive, East
Pontiac, Michigan 48058
Telephone: 313-333-7131

Counsel for Respondents

Dated: January 4, 1974.

APPENDIX

SUMMARY JUDGMENT OF OAKLAND COUNTY CIRCUIT COURT

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR
THE COUNTY OF OAKLAND

EDWARD R. BIGGER, WALTER BLACKMON, KENNETH DOOLEY, LUCILLE NORD, SHIRLEY GOFF, PAUL BROCK, JOSHUA HEBINGTON, ORVILLE THOMPSON, WILLIAM TEAGUE, MARGARET OSBORNE, CAROL L. CARRIE, and others too numerous to bring before the Court,
Plaintiffs,

NO. 73-101042

v

CITY OF PONTIAC and CITY OF PONTIAC STADIUM BUILDING AUTHORITY,
Defendants

SUMMARY JUDGMENT
IN FAVOR OF DEFENDANTS

At a session of said Court held in the City of Pontiac, in the County of Oakland on August 8, 1973.

PRESENT: Honorable Arthur E. Moore, Circuit Judge.

The Defendants herein having filed with this Court a Motion for Summary and Accelerated Judgment as to Plaintiffs' Complaint together with supporting affidavits, brief, and memorandum of authorities; the Plaintiffs having filed an answer to the motion, supporting affidavits, memorandum of law, and amendment to Complaint; the

Court having heard oral argument of counsel for both parties and viewed supporting exhibits offered by the parties; and the Court being fully advised in the premises finds as follows:

1. The contracts and alterations thereof to which reference is made in Paragraphs 6, 7, 8 and 9 of the Complaint were not legally required to be made prior to said election or to be before the voters at the time of the election but were properly made subsequent thereto and neither the execution of such contracts and alterations nor the fact that they were not before the voters at the time of the election, nor any of the provisions thereof to which reference is made in the Complaint (especially Paragraph 9 thereof), was or is unlawful or violated any rights of, or constituted actual or constructive fraud upon, the Plaintiffs, the electors of the City, or other parties mentioned in the Complaint.

2. The fact that, prior to the time of the election, it was generally understood and was represented in published newspaper advertisements that the stadium would be constructed with a dome or roof, whereas presently executed construction contracts do not include construction of a dome or roof from proceeds of the bonds now authorized to be issued, does not constitute a violation of any rights of, or an actual or constructive fraud upon, the Plaintiffs, the electors of the City, or other parties mentioned in the Complaint and does not vitiate the election or the project or constitute a valid reason for enjoining the issuance of the bonds proposed to be issued by Defendants, for the following reasons:

(a) There has been no abandonment but only a deferment of the construction of the dome or roof as

evidenced by the fact that the architectural contract requires the architects to design the dome or roof as a part of the present plans for the stadium and the construction contract requires the contractor to construct, at a cost of some $2,000,000, the concrete compression ring around the top of the stadium to support the dome or roof as well as certain other work required only for such purpose.

(b) In view of the fact that Ordinance No. 1649, the published ordinance and notices of election, and the ballot proposition all referred only to the construction of a "stadium", i.e., that it was a "stadium" and not a "covered stadium" that the people authorized, the representations made prior to the election cannot properly be construed as imposing a binding obligation requiring the municipality to construct a covered stadium or, in any event, precluding it from, in its discretion, deferring the construction of the dome or roof until some future date.

(c) The representations that a covered stadium would be constructed, even if serving to require such construction where possible from the bond proceeds, cannot reasonably be construed so as to prevent construction of a stadium without a cover, or at least deferment of the construction of the cover, where, as here, there are insufficient bond proceeds to construct initially the dome or roof.

3. Notice of the intention of the Authority to issue revenue bonds in the principal amount of $25,000,000 was published in due time, form and manner as required by MSA 5.2763 and applicable case law, publication subsequent

to Municipal Finance Commission approval of the bond issue not being required by law.

4. Interest for thirty-six (36) months upon the revenue bonds is capitalized and thus is payable, not from revenues of the stadium or from general funds of the Authority or the City, but from the revenue bond proceeds. No interest upon the general obligation bonds of the City is capitalized.

5. Subparagraphs b, c and d of Paragraph 9 of the Complaint pertain only to factors ("difficulties") which might in some contingencies affect stadium revenues (risks such as are inherent in any revenue project) but raise no legal issues pertinent to the issuance of the proposed bonds or to the prayers of the Complaint.

6. The $15,950,000 general obligation bonds proposed to be issued by the City will pledge the full faith and credit of the City for payment of principal and interest as voted by the electors. The $25,000,000 revenue bonds proposed to be issued by the Authority will be payable as to both principal and interest solely from rental payments to be made by the City. The City's obligation to make such rental payments is limited to net revenues derived from actual users of the stadium and the full faith and credit of the City is in no way pledged for the making of such rental payments or for payment of principal or interest on the revenue bonds.

7. The issuance and sale of the bonds proposed to be issued by the City and the Authority would not cause or result in any unconstitutional or unlawful diversion of moneys raised by taxation or any violation of any rights of Plaintiffs.

8. The facts, circumstances and events set forth or alleged in the Complaint, as a matter of law, do not con-

stitute actual or constructive fraud upon the Plaintiffs or any of them and from the very nature thereof could not and do not violate any rights of, or constitute an actual or constructive fraud upon, any of the Plaintiffs or other parties mentioned in the Complaint.

9. Plaintiffs are guilty of laches in the institution of this action and are thereby barred from any of the relief sought by the Complaint for the following reasons:

(a) Plaintiffs brought and the Oakland County Circuit Court dismissed an action last March involving the validity of the election held on December 11, 1972, thus indicating that Plaintiffs were then aware of the facts pertaining to the election and were alerted as to Defendants' plans for issuance of bonds.

(b) The official actions to issue both the general obligation bonds by the City and the revenue bonds by the Authority were taken March 20, 1973, said actions being matters of public record. The Lease-Agreement between the City and the Authority was entered into at the same time.

(c) The final agreement between the City and the Detroit Lions was executed on April 23, 1973 and became a matter of public record.

(d) The issuance of both issues of bonds was approved by the Municipal Finance Commission on June 19, 1973.

(e) The bonds were sold at public sale on July 17, 1973. Plaintiffs initial action was filed in the Supreme Court the next day.

(f) All of the above events were well publicized in the press.

(g) Defendants, during the period from March 20, 1973 to July 18, 1973, incurred large expenses for architectural, financial, legal and other services related to the stadium and the marketing of the bonds.

(h) The Official Prospectus was made available only about July 1, and it is this fact upon which Plaintiffs rely as an excuse for their delay in bringing suit, but the Prospectus contains virtually no new facts or data not already matters of public record since at least April 23, 1973. In particular, the deferment of the dome or roof was decided upon, made a matter of public record, and reported in the press as early as March 20, 1973.

10. The Complaint fails to state any claim upon which relief can be granted or to raise any genuine issue of material fact.

IT IS THEREFORE ORDERED AND ADJUDGED, that Defendants' Motion for Accelerated Judgment is hereby granted on grounds of laches on the part of Plaintiffs and the Complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED, that Defendant's Motion for Summary Judgment is hereby granted for failure to state a claim upon which relief can be granted and the Complaint is hereby dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED, that Defendant's prayer for affirmative relief in the form of an injunction against institution of other litigation is hereby denied but without prejudice.

IT IS FURTHER ORDERED AND ADJUDGED, that Plaintiffs, having filed an amendment to the Complaint and

having been accorded full opportunity to make such allegations and raise such issues herein as they desired, shall have no right to file any further amended pleadings with respect to the matters involved in this action.

/s/ ARTHUR E. MOORE
Circuit Judge

A TRUE COPY
LYNN D. ALLEN
Oakland County Clerk-Register of Deeds
By: M. NEWTON, Deputy

COMPLAINT (AS AMENDED) FILED BY PETITIONERS IN OAKLAND COUNTY CIRCUIT COURT ON AUGUST 1, 1973

(Title of Court and Cause)
COMPLAINT

Plaintiffs say:

1. THAT Plaintiffs are residents of the City of Pontiac and taxpayers of the City of Pontiac, and that Plaintiffs fairly represent a class so numerous so as to be impracticable to bring all of the members before the Court and that the Plaintiffs are in communication with other members of the class;

2. THAT Defendant CITY OF PONTIAC is a Michigan municipal corporation, duly formed and organized;

3. THAT the CITY OF PONTIAC STADIUM AUTHORITY was organized by Defendant City and controlled by said City;

4. THAT general obligation bonds in excess of Fifteen Million Dollars have been voted on and approved by the electorate of the City of Pontiac to partially finance a sports stadium in the City of Pontiac, said election having occured on December 11, 1973.

5. THAT said stadium is designed to accommodate the Detroit Lions, Inc., a football organization;

6. THAT since said election new or substantially altered contracts have been executed by and between the City and the Authority and the football club.

7. THAT a domed or covered stadium is no longer provided in said leases and agreements as provided previously to March 13, 1973.

7a. THAT no Notice of Intent has been given by defendants pursuant to MSA 5.2763; MCLA 141.133 and pursuant to the requirements set down by The Michigan Supreme Court in *Alan* v *County of Wayne,* 388 Mich. 210 (338-335) at 352, 353.

8. THAT none of the said agreements were before the voters at the time of the December election.

9. THAT the new agreements provide for the followings:

a. THAT the stadium bonds themselves state that capitalized interest is not payable solely from the net revenues derived from the stadium rental (p. 113 Exhibit A. Official Prospectus) and that said payments are derived from General funds without a vote of the electorate.

b. THAT none of the various parties are responsible under the terms of the various agreements for any delay or loss due to a 'force majeure' including a labor strike and the parties Defendant now admit that serious difficulties could result if a strike by labor should occur during the construction period (p. 36 Speculative Aspects of Revenue Bonds).

c. THAT the sublease and license between the City and the ball club now recognizes that difficulties might arise as a result of the stadium if a service fee of One

Dollar Fifty Cents (1.50) per ticket may be declared unlawful taxation (p. 155); and it is avered.

d. THAT the sublease further recognizes that taxation may be imposed upon the ball club as a result of legal action including property taxes under Act 189 of the Public Acts of 1953 as amended (p. 156) and it is so avered.

10. THAT Defendants verily believe that the taxpayers and Plaintiffs will be responsible if the stadium project should fail for any of the foregoing reasons even though the agreements between the various parties Defendant specifically states that no such responsibility will exist; said belief being based upon the fact that a general contractor on the stadium project and any other interested third party would be entitled to relief against the City of Pontiac, or its' Stadium Authority, or both, and that Plaintiffs and others are obligated past the year Two Thousand under general obligation bonds and under any assessments imposed as a result of unsuccessful litigation where the City is a Defendant.

11. THAT is this Honorable Court does act to enjoin said stadium plan, Defendants believe that irreparable damage will be done wherein levies without limitation as to rate or amount will be imposed against them, even though not a single sport event occurs in said stadium.

12. THAT a constructive or real fraud has occurred as a result of all of the above upon Plaintiffs and others and that the same has only come to light clearly following the publication of the Official Prospectus, Exhibit A, annexed hereto and made a part hereof, and that copies of the same have only been received on or about July 16th by the Plaintiffs.

13. THAT the issurance and sale of said bonds or any part thereof would cause an unconstitutional and unlawful

diversion of moneys raised by taxation and would be a violation of the rights of Plaintiffs for which they have no adequate remedy at law.

WHEREFORE, Plaintiffs pray that Defendants, and each of them and their and each of their agents, attorneys, deputies, employees and successors, may be enjoined pending final determination of this cause, and until the further Order of the Court, from issuing, signing, selling, or otherwise disposing of any bonds of the City of Pontiac, Michigan, for the purposes hereinbefore mentioned, or any of them; that, upon the hearing and determination hereof, said injunction may be made permanent, and that this Court declare the rights of the respective parties in this litigation, pursuant to GCR 1963, rule 521, and for such other and further relief as the Court may deem equitable and proper but without Court costs or any fees, a public matter being involved.

/s/ JAMES E. WELLS
Att'y for Plaintiffs

Dated: August 1, 1973

PARAGRAPH 4 OF "OBJECTIONS TO ENTRY OF PRELIMINARY INJUNCTION" FILED BY DEFENDANTS ON FEBRUARY 26, 1973 IN OAKLAND COUNTY CIRCUIT COURT IN CASE NO. 73-95345 ENTITLED "WALTER BLACK, ET AL. VS. CITY OF PONTIAC."

4. For preliminary injunctive relief to be entered, there must be proof that irreparable injury will inure to the person requesting relief if it is not granted. E.g. *School District of the City of Royal Oak* vs. *Michigan State Tenure Commission*, 367 Mich. 689 (1962). There is no showing in plaintiffs' Complaint—nor could there be—that any such

irreparable damage would inure to them should the relief sought not be granted. Further, the mere apprehension of injury or damage at some remote future date cannot be the basis for issuance of a preliminary injunction under the Michigan Supreme Court's decision in *Fenestra, Inc.* v. *Gulf American Land Corp.*, 377 Mich. 565 (1966). Since, as is set forth above, the City of Pontiac will not be in a position to either issue or sell the stadium bonds for several months, this request for preliminary injunctive relief is not only premature, but is based on plaintiffs' apprehension of injury or damage which will occur only in the future. Such apprehension cannot, under the *Fenestra* rule, form the basis for entry of the injunctive relief requested.

ORDER OF U.S. DISTRICT COURT GRANTING MOTION TO DISMISS IN SIERRA CLUB, ET AL V. GEORGE P. SHULTZ, ET AL, ON SEPTEMBER 5, 1973.

UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SIERRA CLUB and PONTIAC ENVIRONMENTAL DEFENSE FUND,
Plaintiffs,

vs.

GEORGE P. SHULTZ, SECRETARY OF TREASURY, CITY OF PONTIAC, and PONTIAC STADIUM BUILDING AUTHORITY,
Defendants.

Civil Action
No. 4-70276

ORDER GRANTING MOTION TO DISMISS

At a session of said Court, held in the Federal Building, City of Detroit, County of Wayne, State of Michigan, on September 5, 1973

PRESENT: HON. LAWRENCE GUBOW, U. S. District Court Judge

Plaintiffs herein having filed a complaint alleging violations of the Environmental Protection Act and State And Local Fiscal Assistance Act of 1972; the defendants City of Pontiac and Pontiac Stadium Building Authority having filed with this Court a motion to dismiss or for summary judgment, supporting brief and affidavits; the Court having heard the oral argument of counsel for the parties thereon; and the Court being duly advised in the premises;

IT IS HEREBY ORDERED that said defendants' motion to dismiss be and the same hereby is granted with prejudice for the reason(s) that plaintiffs lack standing to sue; the Complaint is barred by Laches; and no federal question or subject matter jurisdiction is present.

LAWRENCE GUBOW
U. S. District Court Judge

A TRUE COPY
HENRY R. HANSSEN, Clerk
BY PATRICK D. DUFFY
Deputy Clerk

EXCERPT FROM OPINION OF U.S. DISTRICT COURT IN SIERRA CLUB, ET AL V. GEORGE P. SHULTZ, ET AL, ON SEPTEMBER 5, 1973.

Now, first with respect to Defendants' allegation of standing of the parties, it is argued that Mr. Wells in fact represents no one. Mr. Wells, in argument on the motion, has conceded that neither of the so-called unincorporated associations named in the complaint as plaintiffs were in fact registered in the State of Michigan when the complaint was filed. He suggests that they have perhaps been registered today. But no verification of that suggestion has been shown to the Court. Mr. Wells has insisted that the parties to this lawsuit are not the same parties to the prior lawsuit. If that is true, it is only because there are no party plaintiffs at all in this action. There can be no cause of action in a vacuum, in the absence of a party to assert it. Rule 17(b) of the Federal Rules of Civil Procedure would, by its terms, allow an existent unincorporated association to sue or be sued in federal court in its own name notwithstanding its incapacity to do so under state law. That rule does not solve our problem, however, because by counsel's own admission during oral argument, the organizations which have been represented here as parties plaintiff did not, at least until today, even exist as a legal entity in the State of Michigan. What we are left with then is a possible cause of action in search of a legitimate plaintiff. There is no plaintiff with standing to bring this action and dismissal of the action on this basis is justified.

Secondly, with regard to the question of laches, in the opinion of the Court, this must be considered against a background of previous litigation. There have been three

lawsuits prior to this one, all filed by Mr. Wells. The first was filed in Oakland County Circuit Court on February 19, 1973. That complaint challenged the validity of the December 11, 1972 election in which the Pontiac voters approved the financing of the stadium. The Oakland County Circuit Court entered an order granting summary judgment and accelerated judgment in favor of the defendants on March 12, 1973. Thereafter, construction bids were obtained and the authorized bonds were sold. Then, on July 17, 1973, Mr. Wells filed a second complaint challenging the legality of the financing. That complaint, filed directly in the Supreme Court, was dismissed on July 31, 1973. On August 1, 1973, Mr. Wells filed another action in Oakland County Circuit Court, again attacking the financing. On August 8, 1973, the defendants' motion for accelerated judgment was granted. This decision was affirmed on direct appeal to the Michigan Supreme Court on August 24, 1973.

In the meantime, an August 22 expiration date for guaranteed construction costs was extended to September 7, 1973, a deadline which, as a practical matter, imposes on this Court the duty to decide this case today. The bonds, which have been sold, will not be accepted by the purchaser unless the defendants are able to deliver a letter to the purchasers indicating that any litigation involving the validity of the bonds or seeking to enjoin the construction has been dismissed. Thus, the very fact that the lawsuit exists in effect accomplishes Mr. Wells' purpose of enjoining progress on the stadium, since it stands as a roadblock to the financing needed to meet the September 7 expiration date for the guaranteed construction costs.

Mr. Wells, who by now is a veteran of this battle, was obviously not unaware of these timing problems. The cause of action, if there is one, which he states in his

complaint, is one which has been known to him at least since the time when the possibility of the use of revenue sharing funds for the financing of the stadium was first raised in the news media in December 1972. It is impossible to escape the conclusion that this lawsuit was filed not to resolve a good faith dispute between the parties on the merits of the matters asserted in the complaint but rather as yet another roadblock in a potentially infinite series of roadblocks designed simply to make it impossible for Defendants to accomplish delivery of the bonds to the bond purchasers.

The defense of laches requires lack of diligence by the party against whom the defense is asserted, as well as prejudice to the party asserting the defense. *Costello* vs. *United States,* 365 US 265. This doctrine has been held to be applicable in environmental cases. *Minnesota Public Interest Research Group* vs. *Butz,* 358 Fed Supp 584; *Clark* vs. *Volpe,* 342 Fed Supp 1324. Both the lack of diligence and the prejudice are manifest in this case. The lack of diligence is manifest because Mr. Wells, who has known about the stadium construction plans since their inception and who has known of the allegations in his complaint for at least several months, brought this action at the eleventh hour, just before the bonds were to have been delivered and shortly before the expiration date of guaranteed construction costs. This delay is simply inexcusable. Mr. Wells has had his day in court and he will not succeed in using this court as an appellate tribunal to achieve what he failed to achieve in state court. The element of prejudice is even more manifest. The financing of the stadium has been placed in jeopardy and the guaranteed construction costs, achieved only after lengthy negotiations, are about to expire.

AMENDMENT "A" OF PONTIAC STADIUM CONSTRUCTION MANAGEMENT CONTRACT

WHEREAS, under date of July 9, 1973, the City of Pontiac Stadium Building Authority, hereinafter referred to as the "Owner", and Barton-Malow Company, hereinafter referred to as the "Contractor", entered into a contract which, as heretofore supplemented and amended, is hereinafter referred to as the "Contract" and provides for the construction of a stadium in the City of Pontiac at a Guaranteed Maximum Construction Cost of $29,300,000 exclusive of the Contractor's fee but does not include provision for a stadium roof as part of such construction; and,

WHEREAS, the Owner has determined that the cost of construction of the stadium including a roof, can be paid from available funds, and has accordingly, on November 7, 1973, adopted the following resolution:

> "Resolved that the Pontiac Stadium Building Authority hereby authorizes the addition of the total roof system for the stadium project and the installation of a security fence around the perimeter of the stadium property to the contract of the construction manager and directs the preparation of the appropriate modifications of contract documents."

and the parties hereto therefore desire to amend the Contract to provide for construction of the roof and for the inclusion thereof as a part of the project work described in the Contract;

NOW, THEREFORE, the Owner and the Contractor hereby adopt this Amendment "A" of the Contract and agree that the Contract shall be and is hereby amended to include the following in addition to the undertakings therein set forth:

1. The stadium to be constructed pursuant to the Contract shall be constructed with a roof which shall cover and enclose the stadium and afford protection from the elements and the Work as defined in the Contract shall include the complete construction and installation of a total roof system including all ancillary supporting systems and construction. The roof shall consist of a teflon-coated fiberglass-reinforced fabric, sealed to the concrete compression or tension ring around the perimeter of the stadium (the construction of which ring is already included in the Work as defined in the Contract and in the Guaranteed Maximum Construction Cost of $29,300,000), held in position by steel cables anchored in the compression or tension ring, and supported by positive air pressure generated by electrically-driven blowers. The roof system is being structurally designed by Geiger Berger Associates P.C., Consulting Engineers, 500 Fifth Avenue, New York, New York, and shall be installed in accordance with plans and specifications prepared by the architects for the stadium, O'Dell, Hewlett & Luckenbach, 950 North Hunter Boulevard, Birmingham, Michigan, and their associates.

2. The cost of the total roof system including all ancillary supporting systems and construction not already included in the Work as defined in the Contract, which is presently estimated as approximately $4,500,000, shall be finally determined by mutual agreement of the parties upon the basis of firm construction bids to be taken therefor and verification of the cost thereof after completion of the engineering design, plans and specifications. Such cost as finally determined shall be included as an additional part of the Cost of the Work as defined in the Contract and the Guaranteed Maximum Construction Cost specified in the

Contract, and likewise the performance bond required by the Contract to be furnished by the Contractor, shall be increased by a like amount. The fee of the Contractor as Construction Manager as specified in the Contract shall, notwithstanding Section 7.2 of the Contract, also be increased, as shall be mutually agreed by the parties, in an amount commensurate with the increased scope of the Work.

Dated and signed this second day of January, 1974.

OWNER:
City of Pontiac Stadium Building Authority
By: /s/ Harold A. Cousins
Chairman
By: /s/ Robert W. Rummel
Secretary-Treasurer

CONTRACTOR:
Barton-Malow Company
By: /s/ R. M. Wilkening
Executive Vice-President